Mohd Faisal bin Abdullah v Abdul Hamid bin Abdul Kadir o/b Dayalitar Sdn Bhd & Anor

HIGH COURT (ALOR SETAR) — ORIGINATING MOTION NO 25NCVC-02–01 OF 2012
SEE MEE CHUN JC
24 OCTOBER 2012

Legal Profession — Disciplinary committee — Powers of disciplinary committee — Arbitration sum not released by solicitor to client — Solicitor struck off roll — Application to set aside order to struck solicitor off roll — Whether court can interfere in findings of facts by disciplinary committee

The complainant had engaged Messrs Ahmad A Rashid & Co ('Messrs Ahmad'), to make a claim against Tenaga Nasional Bhd ('TNB'). The partner of the firm ('Nazminudin) was in charge of the file and he appointed the respondent as counsel. After the arbitration was complete, a sum of around RM236,382.66 ('the said amount') was awarded. Nazminudin then transferred the file to the respondent. Payment of the arbitration award of the said amount was made to the appellant's firm. However, the complainant demanded his payment to be sent to Messrs Ahmad as he had not appointed the appellant's firm but the money was never paid to Messrs Ahmad. When payment was demanded by the complainant, the respondent issued a notice demanding fees in excess of the sum paid by TNB. To date, the complainant had not been paid and had not been informed of whether the money was still in the appellant's firm. The arbitration committee found that the respondent had received the said amount from TNB on behalf of complainant and that he had failed to release the money to the complainant. The respondent did not give any explanation of what happened to the money. The disciplinary board ('DB') ordered the appellant struck off the Roll. Hence, in the present appeal, appellant appealed that, inter alia, the order be set aside. The respondents, in turn, jointly submitted that the court ought not to interfere in findings of facts made by DB.

Held, allowing the appeal:

(1) The disciplinary committe ('DC') ought to have given weight to the statutory declaration ('SD') of Nazminudin as he was the partner in Messrs Ahmad who handled the arbitration case. He had given a detailed account of his and the appellant's involvement in the arbitration and that complainant was aware of the situation. When Nazminudin left the firm, it was agreed he would take the arbitration file. The complainant subsequently agreed the file would be handled by the appellant's firm. It

was on the basis the change of solicitor was notified to the arbitrator. Hence the SD of Nazminudin was not considered appropriately (see para 5).

(2) The complainant ought to have called Ahmad Rashid of Messrs Ahmad to clarify the situation if the firm had agreed to Nazminudin taking over the Dayalitar file which subsequently led to the appellant conducting the matter. No doubt Tetuan Ahmad was no more and Ahmad Rashid had ceased practice. There was no explanation as to whether there was any attempt to locate him. His evidence would have shed light on the position on the arrangement including that of the fees (see para 6).

[Bahasa Malaysia summary

Pengadu telah meggunakan khidmat Tetuan Ahmad A Rashid & Co ('Tetuan Ahmad'), untuk membuat tuntutan terhadap Tenaga Nasional Bhd ('TNB'). Rakan kongsi firma ('Nazminudin) bertanggungjawab ke atas fail tersebut dan dia melantik repsonden sebagai peguam. Selepas timbang tara selesai, sejumlah wang tunai lebih kurang RM236,382.66 ('jumlah tersebut') diawardkan. Nazminudin kemudiannya memindahkan fail tersebut kepada responden. Bayaran award timbang tara terhadap jumlah tersebut dibuat kepada firma perayu. Walau bagaimanapun, pengadu menuntut bayarannya dibuat kepada Tetuan Ahmad kerana dia tidak melantik firma perayu tetapi wang tunai tersebut tidak pernah dibayar kepada Tetuan Ahmad. Apabila bayaran dituntut oleh pengadu, responden mengeluarkan notis menuntut bayaran yang berlebihan jumlah yang dibayar oleh TNB. Sehingga kini, pengadu tidak dibayar dan tidak diberitahu sama ada wang tersebut masih berada di dalam firma perayu. Jawatankuasa timbang tara mendapati bahawa responden telah menerima jumlah tersebut daripada TNB bagi pihak pengadu dan dia gagal untuk membayar wang tersebut kepada pengadu. Responden tidak memberi apa-apa penjelasan mengenai apa terjadi kepada wang tersebut. Lembaga Tatatertib ('LT') memerintahkan perayu dibatalkan namanya daripada Daftarai. Maka, dalam rayuan ini, perayu merayu bahawa, antara lain, perintah tersebut diketepikan. Responden-responden, seterusnya, bersama berhujah bahawa mahkamah tidak patut campur tangan dalam dapatan fakta yang dibuat oleh LT.

Diputuskan, membenarkan rayuan:

(1) Jawatankuasa Tatatertib patut memberikan pertimbangan kepada perisytiharan statutori ('PS') Nazminudin kerana dia adalah rakan kongsi di dalam Tetuan Ahmad yang mengendalikan kes timbang tara tersebut. Dia telah memberi butir terperinci mengenai penglibatannya dan perayu di dalam timbang tara tersebut dan pengadu menyedari keadaan itu. Apabila Nazminudin meninggalkan firma, ia telah dipersetujui yang dia akan mengambil fail timbang tara tersebut. Pengadu kemudiannya bersetuju fail akan dikendalikan oleh firma perayu. Atas dasar ini,

pertukaran peguambela telah dimaklumkan kepada penimbang tara. Maka PS Nazminudin tidak dipertimbangkan secara wajar (lihat perenggan 5).

(2) Pengadu sepatutnya memanggil Ahmad Rashid daripada Tetuan Ahmad untuk menjelaskan keadaan tersebut jika firma telah bersetuju Nazminudin mengambil alih fail Dayalitar yang kemudiannya membawa perayu mengendalikan kes tersebut. Tidak dapat disangsikan bahawa Tetuan Ahmad tidak lagi beroperasi dan Ahmad Rashid telah berhenti beramal. Tiada penjelasan sama ada terdapat percubaan untuk mencarinya. Keterangannya akan menjelaskan kedudukan mengenai pengurusan termasuk pengurusan fi tersebut (lihat perenggan 6).]

Notes

For a case on powers of disciplinary committee, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 1475.

Cases referred to

Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 4 CLJ 878, CA (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Legislation referred to

Legal Profession Act 1976

Aqbal (Azhar Fazuny) for the appellant.
Ahmad Munawir Abd Aziz (Lim Kean Siew & Co) for the first respondent.
Ahmad Taufiq bin Baharum (Abdul Halim Said & Co) for the second respondent.

See Mee Chun JC:

[1] References to parties are as per proceedings in the High Court. A complaint was lodged against the appellant an advocate and solicitor by the complainant on behalf of Dayalitar Sdn Bhd as at pp 1–3 *rekod rayuan*. Subsequent references to pages are as per *rekod rayuan*. The summary of complaint as noted by the disciplinary committee ('DC') at pp 39–40 is as follows:

(i) the Complainant had engaged Messrs. Ahmad A. Rashid & Co., to make a claim against Tenaga Nasional Berhad. One Nazminudin Mohamad @ Saad a partner in the firm was in charge of the file and the Respondent was appointed as counsel by Nazminudin.

(ii) After artibration was done in K.L. a sum of around RM236,382.66 cts was awarded.

(iii) During this period the said Nazminudin Mohamad @ Saad had

transferred the file to the Respondent. The Respondent who initially was only a counsel had taken over the file from Ahmad A. Rashid & Co., with the consent of the partner Nazminudin Mohamad @ Saad.

(iv) Payment of the arbitration award of RM236,382.66 cts was paid to Messrs. Faisal Abdullah & Co. The complainant had demanded his payment be sent to Ahmad A. Rashid & Co., as he had not appointed Messrs. Faisal Abdullah & Co. The money was never paid to Ahmad A. Rashid & Co.

(v) When payment was demanded by the Complainant the Respondent through his counsel Aqbal & Co., issued a notice demanding fees in excess of the sum paid by TNB.

(vi) Complainant has not been paid to date and he has not been informed whether the money is still in the clients account of Faisal Abdullah & Co.

[2] The finding of fact/liability of DC (pp 46–47) is as follows:

(1) That the Complainant Dayalitar Sdn. Bhd., had only appointed Ahmad A. Rashid & Co.

(2) Ahmad A. Rashid & Co., have appointed Faisal Abdullah & Co., as counsel.

(3) In November 2004 the file had been taken over by Faisal Abdullah & Co.

(4) The Arbitration was concluded in June 2005.

(5) The money was paid to Faisal Abdullah & Co. sometime in the middle of 2005, at the earliest before September 2005.

(6) When the complainant pressed for his money, and the money was not released. He made a complaint in January 2006.

(7) In June 2006 the respondent solicitor had sent a letter demanding fees in excess of the money received from TNB. The sum received from TNB was RM236.382.66 cts.

(8) The Complainant wants his money paid directly to him as Ahmad A. Rashid & Co., has ceased practice.

(9) The respondent solicitor has not paid the money to the Complainant although he had received the money in mid 2005.

(10) The respondent has failed to turn up at any of the hearings and has always requested postponements.

(11) The Committee is not able to determine whether the money is in the clients account of Faisal Abdullah or had been taken out.

(12) The Committee finds the Respondent solicitor has breached his duty to release the settlement sum to the complainant at the earliest possible times and is evading payment.

[3] In the amended copy of report of DC the finding of liability and recommendation (pp 50–51) is as follows:

(1) THE COMMITTEE'S FINDING OF LIABILITY:-

The committees finding of facts and liability is as per the notes attached;

(i) The Respondent had received RM236,382.66 cts from TNB on behalf of complainant.

(ii) He has failed to release the money to the Complainant,

(iii) The Respondent had demanded fees in excess of the amount paid by TNB as a ploy to set off the sum in his hands.

(2) THE COMMITTEE'S RECOMMENDATION

The Respondent did not give any explanation of what happened to the money. If the money had been appropriated towards fees then a receipt ought to have been brought in as evidence.

It is also our finding that Faisal Abdullah & Co., was not the solicitor engaged by the Complainant and no arrangement of fees was made with them.

The Claimant to any fees is Ahmad A. Rashid & Co., from whom the file was taken after the award.

From the evidence of the Complainant the Respondent has not paid him. It is our finding that the money received had been taken by the Respondent.

There is merit in the complaint and the Advocate & Solicitor be suspended for a period of 3 years.

The Committee recommends that the Disciplinary Board make an order of restitution of the sum of RM236,382.66 cts to the complainant.

[4] On 9 December 2011 the disciplinary board ('DB') ordered the appellant struck off the Roll with effect from 21 days from the date of order (p 74). The appellant then appealed to this court that the order be set aside and other ancilliary relief. The respondents filed a joint submission. The essence of the submission was that the court ought not to interfere in findings of facts made by DC specifically the finding:

(i) The Respondent had received RM236,382.66 cts from TNB onbehalf of Complainant.

(ii) He has failed to release the money to the Complainant.

(iii) The Respondent had demanded fees in excess of the amount paid by TNB as a ploy to set off the sum in his hands.

It was also submitted the appellant had failed to return the money to the complainant and that the finding '… The Committee finds the Respondent solicitor has breached his duty to release the settlement sum to the complainant at the earliest possible times and is evading payment …' was appropriate. This amounted to a misappropriation of property which is a misconduct within the Legal Profession Act 1976 and a criminal offence.

[5] From the report of DC (pp 39–51) only the complainant gave evidence. At p 47 DC noted 'respondent (ie appellant) has failed to turn up at any of the hearings and he always requested postponements'. Although the appellant did not give evidence in person his explanation dated 12 June 2006 was taken into consideration. I find DC ought to have given weight to the statutory declaration ('SD') of Nazminudin bin Mohammad Saad ('Nazmin') dated 6 June 2006. Nazim was the partner in Tetuan Ahmad A Rashid & Co who was handling the arbitration case for Dayalitar. He had given a detailed account of his and the appellant's involvement in the arbitration and that complainant was aware of the situation. When Nazmin left Tetuan Ahmad A Rashid & Co it was agreed he would take the Dayalitar arbitration file. The complainant subsequently agreed the file would be handled by Tetuan Faisal Abdullah & Co, the appellant's firm. It was on the basis the change of solicitor was notified to the arbitrator (letter dated 6 November 2004, p 23) it was however DCs recommendation at p 50 that 'Faisal Abdullah & Co., was not the solicitor engaged by the complainant and no arrangement of fees was made with them'. Hence the SD of Nazim was not considered appropriately.

[6] The complainant ought to have called Ahmad Rashid of Tetuan Ahmad A Rashid & Co to clarify the situation if the firm had agreed to Nazim taking over the Dayalitar file which subsequently led to appellant conducting the matter. No doubt Tetuan Ahmad A Rashid & Co is no more and Ahmad Rashid has ceased practice there was no explanation as to whether there was any attempt to locate him. His evidence would have shed light on the position on the arrangement including that of the fees.

[7] The judgment in default ('JID') obtained on 6 November 2006 by the appellant against the complainant (p 67) was also not considered. In the JID it was declared, inter alia, as follows:

(a) Suatu deklarasi Tetuan Faisal Abdullah & Co adalah peguamcara bagi Dayalitar Sdn Bhd dalam kes Dayalitar Sdn Bhd melawan Tenaga Nasional Bhd sebagaimana disahkan oleh Mahkamah Arbitrasi;

(b) Suatu deklarasi bahawa defendan hendaklah membayar amaun sebanyak RM250,000 sahaja kepada Tuan Faisal Abdullah & Co sebagai yuran guaman yang perlu dibayar.

[8] If this was considered it may well be that DC may not have found at p 50 that:

> iii) The Respondent had demanded fees in excess of the amount paid by TNB as a ploy to set off the sum in his hands.

[9] The letter from the arbitrator dated 29 September 2005 (p 15) in response to a query from Dayalitar had stated in para 3 for Dayalitar to 'Instead refer this matter to your solicitors who have acted for you' and copied to the appellant's firm was also not considered.

[10] The authorities are clear courts ought to be slow to interfere with the findings of fact arrived at by the court of first instance. Hence in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 it was stated at pp 398–399 that:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[11] I am further mindful it is the Bar Council acting through the DC and DB that acts to maintain the highest standard of conduct amongst legal practitioners thereby protecting and safeguarding members of the public. In this regard I refer to *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 4 CLJ 878 where it was said:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Court must necessarily exercise caution when entertaining an appeal in which the control question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour. We would, in this context, express our agreement with the following passage in the *Guide to the Professional Conduct of Solicitors* issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment;
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> > One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.

In our judgment, a court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession …'

[12] However, I was inclined to intervene for the reasons given above.

[13] Be that as it may, I find appellant ought to have taken more strenuous steps to return the money. His counsel had indicated the appellant was prepared to hand over the money to Dayalitar. As the claimant in the arbitration was Dayalitar the money ought to be handed over to it.

[14] Under the circumstances the appeal was allowed and the order of DB was substituted with suspension for 12 months with effect from 9 December 2011 and the appellant to forthwith hand over the sum of RM236,382.66 to Dayalitar.

Appeal allowed.

Reported by Afiq Mohamad Noor